1-1-1972

The Reconstitution of Self-Incrimination: Harris v. New York

Martha A. Roof

THE RECONSTITUTION OF SELF-INCRIMINATION:

HARRIS v. NEW YORK[1]

In February, 1971, the United States Supreme Court rendered a decision which is illustrative of the tendency of the current Court to limit the scope of certain procedural safeguards thought, under the Warren Court, to be dressed already in their full constitutional array. In a short opinion written by Chief Justice Burger and joined by Justices White, Harlan, Stewart and Blackmun, the Court in *Harris v. New York*[2] held admissible, for the purpose of impeaching the trial testimony of a defendant, "trustworthy" prior statements uttered in response to custodial interrogation and absent a valid waiver of the rights enumerated in *Miranda v. Arizona.*[3] The Court in *Miranda* had announced that unless a defendant were properly informed of his right to remain silent and to have the assistance of counsel, his pretrial statements would be inadmissible, at least during the case in chief of the prosecution.[4] Lower courts had construed this prohibition to extend even to the impeachment use of improperly garnered statements.[5] The *Harris* decision, though ostensibly only a limitation on the lower courts' broad application of *Miranda,* represents a significant departure from the principles espoused in that decision.

The petitioner, Viven Harris, was tried on two counts which charged him with twice making illegal sales of heroin to an undercover police officer.[6] At the time of his arrest Harris had been advised of his right to remain silent and had been admonished that anything he said might be used against him in a court of law.[7] Harris had been made aware of his right to have counsel present during any interrogation,[8] but he had not been advised, as required under *Miranda,*[9] that an attorney would be appointed if he could not afford one.[10] Subsequent to receipt

1. 401 U.S. 222 (1971).
2. *Id.*
3. 384 U.S. 436 (1966).
4. *Id.* at 479.
5. *See, e.g.,* cases cited in notes 86-87 *infra.*
6. 401 U.S. at 222-23.
7. People v. Harris, 31 App. Div. 2d 828, 829, 298 N.Y.S.2d 245, 246 (1969).
8. *Id.*
9. See text accompanying notes 35-44 *infra.*
10. 401 U.S. at 224.

of this incomplete notice of his rights, Harris was questioned by an assistant district attorney.[11] During the course of the interrogation, Harris admitted that he acted as the middleman for a narcotics agent in one heroin transaction,[12] and that on another occasion he acted as agent for the same undercover officer in the purchase of two glassine bags of heroin from an unidentified individual.[13]

At Harris' trial the government offered, during its case in chief, testimony about the sales both from the undercover officer and from a fellow officer who substantiated the collateral details.[14] Chemical analysis established the contents of the glassine envelopes to be heroin.[15] Harris, electing to testify, denied obtaining narcotics for the undercover agent on the first occasion,[16] and insisted that the second transaction was part of a scheme to defraud the aspiring heroin purchaser with glassine bags containing only baking powder.[17] Excerpts of Harris' statements transcribed during his interrogation at the police station were read into evidence "solely to impeach [his] credibility."[18] After being advised that these statements touched only upon Harris' credibility and could not be considered proof of guilt,[19] the jury found Harris guilty as charged on the second sale.[20] They failed

11. People v. Harris, 31 App. Div. 2d 828, 829, 298 N.Y.S.2d 245, 246.
12. *Id.* at 830, 298 N.Y.S.2d at 247.
13. *Id.*
14. 401 U.S. at 223.
15. *Id.*
16. *Id.*
17. *Id.*
18. People v. Harris, 31 App. Div. 2d at 830, 298 N.Y.S.2d at 247.

The use of the statement elicited defense objections on two grounds. Only one of those grounds, the *Miranda* issue, reached the United States Supreme Court. The other was based upon sections 813-f and 813-g of the New York Code of Criminal Procedure. Section 813-f requires that the defendant be given pretrial notice if the prosecution intends to offer a confession or admission into evidence; section 813-g provides that a confession or admission shall not be admissible in evidence where a motion to suppress such statement has been granted. 31 App. Div. 2d at 829, 298 N.Y.S.2d at 246. While not available to the jury, Harris' statement was marked in evidence at the suggestion of the trial judge, with the consent of counsel, *only* to enable defense counsel to peruse it. The Appellate Division concluded that it was "readily apparent that the statement was not put in evidence in the truest sense of that word," and since sections 813-f and 813-g "are directed at *evidence* in its conventional form, . . . no pretrial notice is required as to statements used solely for impeachment." *Id.* at 830, 298 N.Y.S.2d at 247. The Court of Appeals of New York agreed with this conclusion. 25 N.Y.2d 175, 177, 250 N.E.2d 349, 351, 303 N.Y.S.2d 71, 73 (1969).

19. People v. Harris, 31 App. Div. 2d at 830, 298 N.Y.S.2d at 247. Defense counsel similarly admonished the jury in his summation. *Id.* at 830, 298 N.Y.S.2d at 247.
20. *Id.* at 830, 298 N.Y.S.2d at 247.

to reach a verdict on the count involving the earlier transaction.[21]

Harris appealed without avail to the intermediate New York appellate court[22] and later to the highest court in that state.[23] The United States Supreme Court granted certiorari and affirmed his conviction in a 5-4 decision.[24]

Speaking for the majority in *Harris*, Chief Justice Burger attached no significance to either certain language in *Miranda* which was capable of being interpreted as a bar to the use of uncounseled statements of a defendant for any purpose, or the opinions of lower courts which had so construed it. Brushing aside unspecified passages in the *Miranda* opinion as mere dicta (and hence dismissing, without even mentioning, lower court opinions based on that dicta), the majority determined that where the evidence is trustworthy it does not follow from *Miranda* that the evidence may not be used for impeachment purposes.[25] If a defendant attempts to use the exclusion of illegally obtained statements as a shield for the commission of perjury, the accused may be impeached by the use of these statements on matters bearing collaterally *or* directly on the crimes charged. Once a defendant has voluntarily undertaken to testify, he is under a duty to speak the truth, and the prosecution has the right to use the time-tested tool of impeachment if he speaks falsely.[26] The majority noted that the jury is aided in gauging a defendant's credibility by the impeachment process.[27] Finally, the majority viewed any spectre of police misconduct flowing from the instant decision to be highly speculative. It was their belief that the exclusionary rule works a sufficient deterrent to police misconduct when illegally obtained statements are made unavailable during the prosecution's case in chief.[28]

Justice Black dissented without opinion.[29] Justice Brennan, joined by Justices Douglas and Marshall, registered a strong dissent. Justice Brennan argued against permitting the use of the tainted statements on four grounds. First, the exclusionary rule of the Fifth Amendment,

21. *Id.* The earlier count, relating to January 4, was subsequently dropped by the State. 401 U.S. at 223 n.1.

22. People v. Harris, 31 App. Div. 2d 828, 298 N.Y.S.2d 245 (1969) (3-2 decision).

23. People v. Harris, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969) (per curiam).

24. 401 U.S. 222 (1971).

25. *Id.* at 224.

26. *Id.* at 225-26.

27. *Id.* at 225.

28. *Id.*

29. *Id.* at 226.

as settled in *Miranda,* protects an individual from being forced " 'to incriminate himself in *any* manner.' "[30] The majority opinion, Brennan asserted, engrafts a significant exception to that rule by permitting unlawfully obtained statements to be used for impeachment.[31] Second, in presenting the government with the opportunity to use a tainted statement to impeach a defendant who has the temerity to testify, the majority opinion denies the defendant an "unfettered" choice of whether to exercise his Fifth Amendment privilege against self-incrimination. He may thus be compelled to exercise it.[32] Third, the rationale underlying the *Miranda* decision—the deterrence of improper custodial conduct by the police—is vitiated by the majority decision since law enforcement officers may now freely interrogate the unadvised and suffer only small consequence at the trial.[33] Indeed, they may reap a benefit. Fourth, the majority opinion ignores the overriding principle that the constitutional foundation of the privilege against self-incrimination is an abiding concern that the government not act ignobly and that the nation's courts refuse to abet such conduct.[34]

In *Miranda*[35] the Court had considered the extent to which the Fifth Amendment self-incrimination privilege extended beyond the realm of the criminal courtroom, and whether absence of counsel during in-custody interrogation might be sufficient to taint with unconstitutionality any statements obtained from an accused.[36] Building on the foundation laid in *Escobedo v. Illinois,*[37] the *Miranda* majority erected around custodial interrogation a framework of procedural safeguards which are prerequisite to the admissibility of a confession arising from such questioning.[38] Starting from the premise that the Fifth

30. *Id.* at 230, *quoting Miranda,* 384 U.S. at 476 (emphasis by Justice Brennan).

31. 401 U.S. at 232.

32. *Id.* at 230.

33. *Id.* at 232.

34. *Id.*

35. 384 U.S. 436 (1966).

36. *Id.* at 439-42.

37. 378 U.S. 478 (1964). The Court, in reversing Escobedo's murder conviction, held that:

> [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment,". . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. *Id.* at 490-91 (citation omitted).

38. 384 U.S. at 444, 476, 478-79. However, the Court did not deny admissibility

Amendment[39] prohibits any person from being forced to be a witness against himself in a criminal proceeding, *Miranda* concluded that such interrogation contained "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[40] Against this backdrop, the Court held that if a defendant had not been fully apprised of his constitutional rights, there could be no inquiry into whether his statements had been, in fact, coerced.[41] Rather, the statements would be presumed compelled because they had been made unintelligently.[42] The accused should at minimum be aware that he has the right to remain silent, that any statements made might be used as evidence against him,[43] that he has the right to the presence of an attorney during questioning, and, if he could not afford one, that an attorney would be appointed to represent him.[44]

Prior to questioning, Harris was given some but not all of the warnings required by *Miranda*; the government failed to inform Harris that a lawyer would be appointed for him if he were indigent.[45] Conceding that Harris' pretrial statements had been elicited in violation of the *Miranda* rule,[46] the prosecution based its case in chief on the testimony

---

to all confessions:

> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. *Id.* at 478 (footnote omitted).

39. No person . . . shall be compelled in any criminal case to be a witness against himself, . . . U.S. CONST. amend. V.

This Fifth Amendment privilege against self-incrimination was held applicable to the states through the Due Process Clause of the Fourteenth Amendment in Malloy v. Hogan, 378 U.S. 1 (1964).

40. 384 U.S. at 467.

41. *Id.* at 457-58.

42. The *Miranda* Court felt "[i]t is only through an awareness of these consequences [i.e., that the statements can be used against the individual] that there can be any assurance of real understanding and intelligent exercise of the privilege." *Id.* at 469.

43. *Id.* at 444, 467-69, 479.

44. *Id.* at 444, 469-73, 479.

45. 401 U.S. at 224.

46. It is of interest that, although the district attorney conceded on appeal that the statement was obtained in violation of *Miranda* (People v. Harris, 31 App. Div. at 830, 298 N.Y.S.2d at 247-48), a determination was nevertheless made by the Appellate Division to this effect after hearing argument. *Id.*

of the involved police officer.[47] However, when Harris testified he related a different version of the facts. When the prosecution attempted to introduce Harris' pretrial statements to impeach his narrative on the stand, defense counsel objected.[48] Although Harris, unlike Miranda, was being subjected to impeachment, defense counsel relied upon the broad holding of *Miranda* which apparently prohibited any use of statements obtained during custodial interrogation in the absence of a full statement of rights.

The majority acknowledged at the outset that *Miranda* might be read to disallow the use of an uncounseled statement in any way.[49] But the Chief Justice, without identifying any specific portion of the *Miranda* opinion to which he referred, summarily disposed of any language in *Miranda* to that effect by characterizing it as mere dicta.[50] Justice Brennan strenuously disagreed with this brusque dismissal of *Miranda.* To Justice Brennan the *Miranda* Court had completely disposed of any distinction between those statements used in the case in chief and those used for impeachment when it said:

> "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner. . . . [S]tatements merely intended to be exculpatory by the defendant are often *used to impeach his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.*[51]

However, because the statements considered in *Miranda* were used by the prosecution in its case in chief, the question of impeachment use was not specifically before that Court. Thus, as the Chief Justice noted in *Harris,* language in *Miranda* capable of being construed as a prohibition on the impeachment use was not necessary to that holding and is not controlling in the instant case.[52] Many lower courts, however, have construed *Miranda* as a bar to any use of custodial statements made in the absence of the required warnings.[53]

Having dismissed any possibility that *Miranda* might be dispositive of the *Harris* case, Chief Justice Burger proceeded to authorize use of the pretrial statements for impeachment by relying upon a 1954 Su-

47. 401 U.S. at 223.
48. See note 18 *supra.*
49. 401 U.S. at 224.
50. *Id.*
51. *Id.* at 230-31, *quoting Miranda,* 384 U.S. at 476-77 (emphasis by Justice Brennan).
52. *See* 401 U.S. at 224.
53. See notes 86-88 *infra.*

preme Court decision, *Walder v. United States.*[54] There, the defendant Walder, like Harris, was on trial for selling narcotics.[55] Unlike Harris, however, during direct questioning and again during cross-examination, Walder went beyond the confines of the issues presented at his trial and testified, of his own accord, that he had never sold or possessed narcotics.[56] The Court, confronted with this "sweeping claim" volunteered by the defendant, allowed the use for impeachment purposes of evidence regarding a heroin capsule taken from the defendant during an illegal search and seizure[57] two years earlier.[58]

Walder stressed that while the government could not affirmatively use the unlawfully obtained evidence,[59] it was "quite another [matter]

54. 347 U.S. 62 (1954).

55. *Id.* at 63.

56. *Id.* at 63-64.

57. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . . U.S. CONST. amend. IV.

58. 347 U.S. at 64. In the earlier proceeding, Walder had successfully moved to suppress the evidence on the grounds that it had been obtained through an unlawful search. The indictment in the United States District Court for the Western District of Missouri for the purchase and possession of one grain of heroin was thereafter dismissed on the Government's motion. *Id.* at 62-63.

59. The Fourth Amendment exclusionary rule prohibited such use. This rule was delineated in Weeks v. United States, 232 U.S. 383 (1914), where a United States marshal had obtained documents from the defendant's residence without a search warrant, while the accused was detained at the station. The *Weeks* Court held that since obtained in violation of the Fourth Amendment, the documents should not have been retained and it was error to have permitted their use at trial. In the course of its opinion, the Court noted:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. *Id.* at 393.

In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the *Weeks* rule was expanded to exclude evidence obtained through information gleaned from illegally seized items. The *Silverthorne* Court felt:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. 251 U.S. at 392.

The Fourth Amendment exclusionary rule was for forty-five years considered to have evolved from an exercise by the Supreme Court of its supervisory capacity over the inferior federal courts. *See* Wolf v. Colorado, 338 U.S. 25 (1949). The question of the Fourth Amendment exclusionary rule's application to the states was finally resolved when the amendment was held applicable to the states through the Due Process Clause of the Fourteenth Amendment in Mapp v. Ohio, 367 U.S. 643 (1961). *Cf.* In re Harris, 56 Cal. 2d 879, 881, 16 Cal. Rptr. 889, 890, 366 P.2d 305, 306 (1961) (Traynor, C.J., concurring).

to say that the defendant can turn the illegal method by which evidence . . . was obtained to his own advantage," and avoid contradiction of his untruths.[60] Application of the exclusionary rule under these circumstances would, the Court felt, constitute a perversion of the Fourth Amendment.[61] Hence, in order to preclude the defendant from twisting the exclusionary rule to meet his own ends, the *Walder* Court permitted an exception to the rule by allowing testimony concerning improperly seized evidence for impeachment purposes only.[62] The *Walder* Court contrasted the situation before it with that faced in the earlier case of *Agnello v. United States*,[63] which prohibited the impeachment use of similar evidence. The government in *Agnello* sought support for the practice of eliciting from the defendant upon cross-examination, testimony regarding contraband which had been previously suppressed.[64] A unanimous Court in *Agnello* held that the defendant could testify, meet the accusation against him, and deny all the elements of the offense without opening the door for the introduction of unconstitutionally obtained evidence. This was true so long as the defendant did not of his own accord introduce the subject of an unlawful search.[65] While the *Agnello* decision was in accord with the Fourth Amendment exclusionary rule, the *Walder* Court found it inapplicable since Walder had gone beyond the mere denial of all the elements of the crime charged and made the "sweeping claim" that he had never dealt in or possessed narcotics.[66]

The *Harris* Court's reliance upon *Walder* must be questioned since the two cases revolve around different constitutional theories. The *Miranda* objection raised by Harris asserted a Fifth Amendment privilege against use of the statements. By its very terms, the Fifth Amendment provision that a person may not be compelled to be a witness against himself in any criminal case[67] seems to constitute an exclusionary provision.[68] On the other hand, the exclusionary rule to

60. 347 U.S. at 65.

61. *Id.*

62. *Id. Walder* has also been used as authority for the impeachment use of statements obtained in violation of the Sixth Amendment right to counsel. United States v. Curry, 358 F.2d 904 (2d Cir. 1966), *cert. denied*, 385 U.S. 873 (1966); People v. Davis, 241 Cal. App. 2d 51, 50 Cal. Rptr. 215 (1966).

63. 269 U.S. 20 (1925).

64. *Id.* at 29-30.

65. *Id.* at 35.

66. 347 U.S. at 65.

67. See note 39 *supra.*

68. *See Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1030 (1966). The language of the Fifth Amendment, by prohibiting the compelling of a

which *Walder* was an exception was fashioned by the Court to implement the prohibitions in the Fourth Amendment against unreasonable searches and seizures. Such prohibitions would be meaningless unless some penalty were provided to prevent their infringement by the government.[69] Without discussion, however, *Harris* extended the application of the *Walder* Fourth Amendment exclusionary rule exception to the Fifth Amendment area. Although some lower courts had already done this,[70] action in this direction was chiefly undertaken during the hiatus between *Walder* and *Miranda.*

In *Brown v. United States,*[71] decided prior to *Miranda,* the Supreme Court expressed its inclination to utilize *Walder* in the Fifth Amendment arena. There, Justice Frankfurter (the author of the *Walder* opinion) borrowed from *Walder* the appraisal that "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the government's disability to challenge his credibility."[72] But the Justice made no attempt to explain *Walder's* application to *Brown,* a Fifth Amendment case in which the petitioner had refused to answer questions regarding Communist Party membership on grounds of self-incrimination.[73] Moreover, in *Brown*

---

person to be a witness against himself, necessarily prohibits the use of any statement compelled from a defendant without regard to any consideration extraneous to the Fifth Amendment itself. *Id.*

69. See note 59 *supra.*

70. *E.g.,* Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966); United States v. Poe, 352 F.2d 639 (D.C. Cir. 1965); White v. United States, 349 F.2d 965 (D.C. Cir. 1965); Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964); United States v. Prebish, 290 F. Supp. 268 (S.D. Fla., 1968); *cf.* Rolland v. Michigan, 320 F. Supp. 1195 (E.D. Mich. 1970), *vacated and remanded,* 439 F.2d 1203 (6th Cir. 1971), for reconsideration in the light of *Harris; but see,* United States v. Acuff, 410 F.2d 463 (6th Cir. 1969).

For the view that some cases have extended *Walder* to allow impeaching evidence which directly related to the offense being tried, see Note, *The Impeachment Exception to the Exclusionary Rules,* 34 U. CHI. L. REV. 939, 940 (1967).

71. 356 U.S. 148 (1958).

72. *Id.* at 156.

73. *Id.* at 152. The petitioner, defendant in a denaturalization proceeding, took the stand and while admitting early membership in a communist-related organization, denied subsequent activities until naturalization and testified she had never "taught or advocated the overthrow of the existing government or belonged to any organization that did so advocate, that she believed in fighting for this country and would take up arms in its defense in event of hostilities with Soviet Russia, and that she was attached to the principles of the Constitution and the good order and happiness of the United States." *Id.* at 150. Although she had previously refused to answer questions regarding the periods subsequent to the time of her naturalization on Fifth Amendment grounds, the government cross-examined her by asking whether she was or ever had been a member of the Communist Party of the United States, and questioned her about activities since naturalization, all of which she refused to answer, claiming the

the petitioner made no claims which flouted the government's inability to introduce evidence; she merely claimed the Fifth Amendment privilege and refused to answer questions propounded to her. Thus it appears that the sentiment, rather than the holding, of *Walder* was evoked in this decision.

In *Smith v. United States*,[74] however, the District of Columbia Court of Appeals squarely faced the question whether *Walder's* rationale should be extended into the Fifth Amendment area. There, the court allowed impeachment of the defendant with inconsistent statements contained in an affidavit required from indigent defendants desiring to subpoena witnesses, despite the objection that the defendant had been compelled in violation of the Fifth Amendment to make the statements. The court recognized that *Walder* was not directly in point, but felt that its underlying rationale was dispositive since the defendant "was not compelled to make a *false* statement."[75]

With the advent of *Miranda*, doubts arose concerning the continued viability of *Walder* in the Fifth Amendment area. *Miranda* did not mention either *Walder* or cases which extended its application to Fifth Amendment situations. Thus post-*Miranda* courts were divided on the issue of whether *Walder* still authorized impeachment by statements obtained in the absence of *Miranda* warnings.[76] While *Walder* had been extended beyond its Fourth Amendment holding into the Fifth Amendment area before *Miranda*, many courts now recognized a distinction between the requirements of the Fourth and Fifth Amendments.[77]

---

self-incrimination privilege. The District Court ruled that by taking the stand in her own defense she had abandoned the privilege and directed her to answer; upon her refusal, she was found in contempt. The court of appeals upheld the conviction, and the Supreme Court affirmed. *Id.* at 157.

74. 312 F.2d 867 (D.C. Cir. 1962).

75. *Id.* at 870-71 (emphasis added).

76. See notes 86-88 *infra.*

77. *E.g.*, the Pennsylvania Supreme Court, in Commonwealth v. Robinson, 428 Pa. 458, 239 A.2d 308 (1968), reversed a first degree murder conviction and ordered a new trial, where the Commonwealth used a written confession obtained in the absence of some of *Miranda's* procedural safeguards to impeach the trial testimony of the defendant. In its opinion, the Court discussed the distinction between the Fourth and Fifth Amendments, and the logic of its analysis cannot be denied:

> In Wright, in line with Walder v. United States we ruled that evidence seized in violation of the Fourth Amendment may be used under certain circumstances to impeach credibility. Wright and Walder are inapposite to situations involving violations of the Fifth Amendment which, unlike the Fourth Amendment, is by its terms directed at excluding evidence rather than at deterring the police from official misconduct. The use of a confession obtained under circumstances violative of the Fifth Amendment for impeachment purposes is as much a

An example of a post-*Miranda* decision finding that statements obtained in violation of *Miranda* could not be used for any purpose including impeachment, is *Groshart v. United States*.[78] Groshart was on trial for smuggling drugs into the United States from Mexico. His trial testimony concerning his acquisition of the contraband-laden vehicle he was driving when arrested differed from the story he related to the arresting customs agent.[79] However, prior to his interrogation at the border, Groshart had not been fully advised pursuant to *Miranda*. He had not been told of his right to have counsel present during interrogation or, if he could not afford counsel, that counsel would be appointed to represent him.[80] The district court allowed certain pretrial statements to be admitted for the limited purpose of impeachment, carefully instructing the jury not to use the evidence to establish guilt.[81]

The jury found the defendant guilty of the crimes charged and he appealed to the circuit court.[82] The Court of Appeals for the Ninth Circuit reversed, holding that the district court erred in admitting the illegally obtained evidence even for the limited purpose of impeaching the defendant. The court, rejecting the government's request to distinguish between the *holding* and the *dicta* of *Miranda*, held that the express language[83] of that decision forbids the use, under *all* circumstances, of evidence obtained in violation of the Fifth Amendment.[84]

---

violation of the privilege against self-incrimination as is its use during the Commonwealth's case in chief. *Id.* at 309 (citations omitted).

78. 392 F.2d 172 (9th Cir. 1968).

79. *Id.* at 174.

80. *Id.*

81. *Id.*

82. *Id.* at 173.

83. The express *Miranda* language relied upon by the court is as follows:

> In fact, statements merely intended to be exculpatory by the defendant are often used to *impeach* his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. *These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.* 384 U.S. at 477, *quoted at* 392 F.2d at 177-78 (emphasis added).

Yet, later in its opinion the *Groshart* court stated that its conclusion was "*impelled* . . . by the force of *Miranda*." *Id.* at 179 (emphasis added). This would tend to indicate reliance on the *dicta* of *Miranda* rather than its *holding*. The dissent in *Groshart* pointed out:

> Neither in the main opinion, nor in any of the three dissenting opinions in *Miranda* is the word "impeach" found, with the single exception of a tangential reference in the majority opinion. *Id.* at 181.

The "tangential reference" alluded to is the inclusion of the word "impeach" in the language relied on by the *Groshart* majority.

84. 392 F.2d at 178. The specific language of the court's holding in *Groshart* was:

> Accordingly, we hold that if statements are obtained from a defendant in vio-

The court also felt that the *Walder* rationale relied upon by the government had been "undermined" by *Miranda.*[85]

Although most state[86] and federal[87] courts followed reasoning similar to that expounded by the Ninth Circuit in *Groshart,* a respectable minority of the states and the Second Circuit shared the view of Chief Justice Burger in *Harris.*[88] A matter of puzzlement about the Chief Justice's opinion in *Harris* is its failure to employ the ramifications of the Court's earlier decision in *Harrison v. United States,*[89] which, by

---

lation of the *Miranda* rules and if the interrogation relates to an offense for which the defendant is ultimately brought to trial, those statements, as well as any portions thereof, may not be used against the defendant at the trial for any purpose whatsoever. *Id.* (footnote omitted).

The breadth of the *Groshart* holding was, however, slightly qualified:

Of course, the inability of the prosecution to use the defendant's statements would not prevent their admission where the defendant himself voluntarily seeks their introduction. We need not consider whether the fact of the existence, or even the content, of the statements should become available for use by the prosecution in the "unusual situation," recently considered by the Second Circuit, "where the defendant's testimony puts in issue the very question of what he told the police." *Id.* at 178 n.4, *quoting* United States v. Armetta, 378 F.2d 658, 662 (2d Cir. 1967).

85. 392 F.2d at 178.

86. People v. Barry, 237 Cal. App. 2d 154, 46 Cal. Rptr. 727 (1965), *cert. denied,* 386 U.S. 1024 (1967) (relying on Escobedo v. Illinois, 378 U.S. 478 (1964)); Velarde v. People, 466 P.2d 919 (Colo. 1970); State v. Galasso, 217 So. 2d 326 (Fla. 1968); People v. Luna, 37 Ill. 2d 299, 226 N.E.2d 586 (1967) (expressly reserving decision on this point); Franklin v. State, 6 Md. App. 572, 252 A.2d 487 (1969); People v. Wilson, 20 Mich. App. 410, 174 N.W.2d 79 (1969); State v. Catrett, 276 N.C. 86, 171 S.E.2d 398 (1970); State v. Brewton, 247 Ore. 241, 422 P.2d 581 (1967), *cert. denied,* 387 U.S. 943 (1967); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968); Spann v. State, 448 S.W.2d 128 (Tex. Cr. App. 1969); Cardwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967). *See also* Kelly v. King, 196 So. 2d 525 (Miss. 1967).

87. Agius v. United States, 413 F.2d 915 (5th Cir. 1969); Fowle v. United States, 410 F.2d 48, 52 (9th Cir. 1969) (not specifically mentioning *Miranda,* but stating that "the present validity of the doctrine [of *Walder*] is extremely questionable."); Breedlove v. Beto, 404 F.2d 1019 (5th Cir. 1968); Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968); United States v. Fox, 403 F.2d 97 (2d Cir. 1968); Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968); United States v. Pinto, 394 F.2d 470 (3d Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967). *See also* Dillon v. United States, 391 F.2d 433, 437 (10th Cir. 1968) (where the court said that *Walder* "contained the standards for impeachment by prior statements illegally obtained," inasmuch as *Miranda* had not been decided when the trial occurred); Rolland v. Michigan, 320 F. Supp. 1195 (E.D. Mich. 1970); Hunt v. Cox, 312 F. Supp. 637 (E.D. Va. 1970).

88. United States v. Vanterpool, 394 F.2d 697, 699 (2d Cir. 1968); United States v. Armetta, 378 F.2d 658, 661-62 (2d Cir. 1967); State v. Kimbrough, 109 N.J. Super. 57, 262 A.2d 232 (1970); State v. Butler, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969); State v. Grant, 459 P.2d 639 (Wash. 1969). *But see* United States v. Fox, 403 F.2d 97 (2d Cir. 1968).

89. 392 U.S. 219 (1968). Harrison was convicted of murder after a jury trial in the District of Columbia District Court, at which trial three confessions purported to have

implication, presaged *Harris.* Mr. Justice White, dissenting in *Harrison,* noted:

> Similarly, an inadmissible confession preceding a plea of guilty would taint the plea. And, as a final consequence, today's decision would seem to bar the use of confessions defective under *Miranda* or *Mallory* from being used for impeachment when a defendant takes the stand and deliberately lies.[90]

In response to Justice White's suggestion, Justice Stewart, speaking for the majority, said: "[W]e decide here only a case in which the prosecution illegally introduced the defendant's confession in evidence against him at trial in its case-in-chief"[91] This implicit recognition by the Warren Court that the impeachment use of statements obtained in violation of the Fifth Amendment was not a settled issue, and thus not controlled by *Miranda,* was not capitalized upon by Chief Justice Burger in *Harris.*

Even if *Miranda* does not preclude the use of illegally obtained intangible evidence for impeachment purposes, the Chief Justice's reliance on *Walder* for this proposition raises an additional problem. In *Walder* the defendant took the stand and, on direct examination, "made the sweeping claim that he had never dealt in or possessed any narcotics."[92] On cross-examination the government, over the defendant's objection, questioned the defendant about the heroin capsule illegally seized two years earlier. The defendant denied that any narcotics were ever taken from him at that time. The government then offered contradicting testimony by one of the officers who had participated in the unlawful search and seizure. The trial judge al-

---

been made by him while in police custody were admitted in evidence. On the advice of counsel, and to rebut these confessions, the defendant took the stand and gave his own version of the events leading to the victim's death, which testimony placed the defendant, shotgun in hand, at the scene of the killing. Harrison's conviction was reversed on appeal, on the ground that the three confessions had been illegally obtained. Harrison v. United States, 359 F.2d 214 (D.C. Cir. 1965). Two were held inadmissible under Mallory v. United States, 354 U.S. 449 (1957), and admission of the third was held to violate a prior *en banc* decision of the Court of Appeals, 392 U.S. at 220 n.2. On remand, Harrison was again convicted after a trial in which his prior testimony was read over objection, which conviction was affirmed by the Court of Appeals. 387 F.2d 203 (D.C. Cir. 1967). The Supreme Court, on certiorari, reversed, holding that the defendant's trial testimony was inadmissible as the fruit of the illegally procured confessions, under Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), and Wong Sun v. United States, 371 U.S. 471 (1963). 392 U.S. at 222, 226.

90. 392 U.S. at 234.

91. *Id.* at 223 n.9.

92. 347 U.S. at 63.

lowed this extrinsic evidence solely for the purpose of impeaching the defendant's testimony on direct examination and carefully instructed the jury to that effect.[93] The Supreme Court affirmed, limiting its exception to the exclusionary rule to situations where the illegally obtained evidence is offered to impeach the defendant on matters collateral[94] to the crime charged, *i.e.*, where the defendant's testimony does more than deny the elements of the crime for which he is

93. *Id.* at 64.

94. The *Walder* Court did not expressly state that the matter about which Walder was impeached was "collateral." Wigmore has stated the test of what is collateral as follows: "Could the fact as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" 3 J. WIGMORE, EVIDENCE § 1003 (3d ed. 1940). Hence, since the Government in *Walder* could not introduce the illegally obtained evidence in its case in chief or for any other purpose except to show self-contradiction, the subject matter of the impeaching evidence was collateral to the issues in *Walder.*

In the Supreme Court, counsel for Walder also argued that, aside from the exclusionary rule, general rules of evidence prohibited impeachment on collateral matters through the utilization of extrinsic evidence. 98 L. Ed. at 504. The *Walder* Court did not directly confront this objection. However, the Court appeared to answer the contention in a footnote where it quoted a passage from Michelson v. United States, 335 U.S. 469 (1948):

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. *Id.* at 479.

From this the *Walder* Court reasoned:

> The underlying rationale of the Michelson case also disposes of the evidentiary question raised by petitioner, to wit, "whether defendant's actual guilt under a former indictment which was dismissed may be proved by extrinsic evidence introduced to impeach him in a prosecution for a subsequent offense." 347 U.S. at 65 n.3.

Generally, apart from any consideration of the Fourth and Fifth Amendment exclusionary rules, collateral impeachment through the use of extrinsic contradictory evidence or of prior inconsistent statements was not possible. This rule of inadmissibility was based on policy objections: the possibility of unfair surprise, confusion of issues, and undue consumption of time. B. WITKIN, CALIFORNIA EVIDENCE § 1259 (2d ed. 1966) [hereinafter cited as WITKIN]. Under California law, some cases allowed the trial judge to have some measure of discretion to allow or prevent cross-examination on collateral matters. "But *extrinsic evidence* was held inadmissible, pursuant to an inflexible rule of exclusion." WITKIN, *supra* § 1259. This inflexible rule of exclusion appears to be the majority rule. C. MCCORMICK, EVIDENCE § 47 (1954). However, an apparent exception to this rule is found where the defendant-witness on direct examination makes a statement not relevant to the crime for which he is being tried. In such a situation it is said that the "offering party on direct examination opened the 'door' or the 'gates,' and that the adverse party is 'fighting fire with fire'. . . ." WITKIN, *supra* § 1267. The *Walder* situation seems to fall within this "opening the door" exception to the rule of inadmissibility, and the Court's use of the *Michelson* decision indicates that this exception is the basis of the rejection of Walder's contention that extrinsic evidence is inadmissible for impeachment on collateral matters. However, the Court did indicate an additional basis for the rejection of Walder's contention when it said:

being tried.[95] Had the impeaching evidence in *Walder* been offered to rebut the defendant's denial of some or all elements of the crime for which he was being tried, and that evidence related to such elements, it is clear that the result in *Walder* would have been quite different.

In *Harris*, Chief Justice Burger, indignant over what he considered to be the sharp contrast between Harris' trial testimony and his earlier statements,[96] forbore from applying the limits to the *Walder* holding. The Chief Justice acknowledged that Walder was impeached on "collateral matters" included in his direct testimony, while Harris was impeached "as to testimony bearing more directly on the crimes charged."[97] However, the Chief Justice was not "persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*,"[98] and thus refused to limit the impeachment use of illegally obtained evidence to only those matters collateral to the crime charged.

Justice Brennan also recognized that Walder was impeached on collateral matters, while Harris was impeached on matters bearing directly on the crime for which he was charged.[99] In his view, the *Walder* Court expressly limited its holding to collateral impeachment

---

Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his *credibility*. 347 U.S. at 65 (emphasis added).

Because Walder "opened the door" by his sweeping claim on direct examination, his credibility was put into question. Since the defendant-witness' credibility is always relevant and non-collateral, his credibility may be challenged by extrinsic evidence. WITKIN, *supra* § 1261.

The California Evidence Code has eliminated the distinction between matters collateral and matters directly relating to the crime charged. The inflexible rule requiring the exclusion of extrinsic evidence to impeach on matters collateral to the crime has also been eliminated. Under the Evidence Code, the trial judge is given general discretion to exclude any evidence in order to prevent confusion of issues or undue consumption of time. CAL. EVID. CODE § 352 (West 1968). "[H]ence, [the trial judge] may either allow or refuse to permit impeachment on a collateral matter in any particular situation." WITKIN, *supra* § 1259.

95. 347 U.S. at 65-66.

96. 401 U.S. at 225.

97. *Id.*

98. *Id.* This has not always been Chief Justice Burger's view. In Lockley v. United States, 270 F.2d 915, 920 (D.C. Cir. 1959) (finding a written confession, introduced by the prosecution solely for impeachment purposes, to be voluntary) (dissenting opinion), the Chief Justice said:

> It is my view that [the trial judge should] . . . receive in evidence only that part of the written statement which does not go to the admission of acts which constitute necessary elements of the crime itself. . . . *Id.*

99. 401 U.S. at 228.

and this limitation was compelled by the Constitution.[100] The *Walder* Court said:

> Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief.[101]

Even though the *Walder* Court did not identify the specific constitutional provision which it felt guaranteed the defendant the fullest opportunity to meet the accusation against him and to deny freely all the elements of the case, Justice Brennan determined that *Miranda* had identified the Fifth Amendment's privilege against self-incrimination as such a provision.[102]

Justice Brennan viewed this privilege as "fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the *unfettered* exercise of his own will.' "[103] From this premise Justice Brennan concluded that this privilege is violated when

> the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him.[104]

In his view, this proposition is supported by *Miranda,* wherein it was noted that statements intended to be exculpatory are often utilized for impeachment purposes at trial and that such statements " 'are incriminating in any meaningful sense of the word and may not be used without the full warnings.' "[105]

Chief Justice Burger also considered the Fifth Amendment as encompassing the right to voluntarily choose whether or not to testify.[106] Once the criminal defendant chooses to testify in his own defense, according to the Chief Justice, "that privilege cannot be construed to include the right to commit perjury."[107] The assumption underlying such a

100. *Id.* at 228-29.

101. 347 U.S. at 65.

102. 401 U.S. at 229.

103. *Id.* at 230, *quoting* Malloy v. Hogan, 378 U.S. 1, 8 (1964) (emphasis by Justice Brennan).

104. 401 U.S. at 230.

105. *Id., quoting Miranda,* 384 U.S. at 476-77 (emphasis by Justice Brennan is deleted). Since Justice Brennan felt that *Miranda* excluded the use of the statement in any manner, he found it unnecessary to consider petitioner's argument that *Miranda* had overruled the "narrow exception [of *Walder*] . . . admitting impeaching evidence on collateral matters." 401 U.S. at 230 n.3.

106. *Id.* at 225.

107. *Id.*

view, however, is that the defendant's trial testimony is a prevarication while the prior inconsistent statement elicited during custodial interrogation is the truth. This assumption is a direct refutation of the predominant theme of *Miranda.* There, one of the stated reasons for the required warnings was the presumed unreliability of statements obtained during in-custody interrogations.[108] The inherent pressures of such a situation were felt to be too conducive to an unintelligent, involuntary, and hence, unreliable rendition of facts by a defendant concerned only with terminating the interrogational process.[109] The *Miranda* warnings were created to prevent the admissibility of such statements. Without these warnings, any statements made by the defendant would be conclusively presumed to be unintelligent, involuntary, or mentally coerced so as to render them unreliable and inadmissible.[110] With such warnings, any statements made thereafter would at least be made by a defendant cognizant of his right to be silent and to obtain counsel, and in effect would constitute a waiver. However, such an uncounseled waiver would nevertheless create doubt regarding the statements' reliability and consequent availability for admission into evidence.[111] Thus to assume, as the Chief Justice necessarily must in *Harris,* that the criminal defendant who testifies to facts inconsistent with his prior statements, elicited without *Miranda* warnings, is committing perjury, is to presume the reliability of the prior statement in contravention of *Miranda.* Here, however, lies the possible justification for admitting illegally obtained *tangible* evidence for

108. Although some question whether the exclusion required by the Fifth Amendment, as interpreted by the Supreme Court, rests on any considerations of reliability (Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect,* 43 S. CAL. L. REV. 597, 603 (1970); Driver, *Confessions and the Social Psychology of Coercion,* 82 HARV. L. REV. 42, 43 (1968); *cf.,* Comment, *Inherent Coercion and Third Party Standing to Assert Escobedo and Miranda,* 41 S. CAL. L. REV. 917, 923 (1968)), the *Miranda* Court specifically recognized that the interrogation procedures which they were at pains to eliminate might give rise to a false confession, 384 U.S. at 455 n.24, and in providing that an accused should have knowledge of his right to have counsel present, the Court said:

> [T]he assistance of counsel can mitigate the dangers of untrustworthiness. . . . The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. *Id.* at 470.

See Note, *The Impeachment Exception to the Exclusionary Rules,* 34 U. CHI. L. REV. 939, 948-49 (1967).

109. 384 U.S. at 455.

110. This theme runs through the *Miranda* opinion. *Id.* at 457-58, 461, 468-69, 474, 476.

111. *See* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized,* 56 CALIF. L. REV. 579, 602 (1968).

impeachment purposes. Physical evidence, although obtained in violation of the Fourth Amendment, is nonetheless reliable.[112] Since the reason for the Fourth Amendment exclusionary rule is not the inherent unreliability of unlawfully obtained physical evidence,[113] such evidence arguably could be admitted solely for impeachment purposes.

Clearly Justice Brennan is correct. *Miranda* disallows an assumption that the defendant who testifies inconsistently with a prior unlawfully obtained statement is committing perjury. Such an assumption cannot justify the admission of illegally procured statements for impeachment purposes in light of the Fifth Amendment guarantee that the accused enjoys "the right to 'remain silent unless he chooses to speak in the *unfettered* exercise of his own will.' "[114] If the accused knows that any earlier, possibly unintelligent, statement, bearing directly on the crime for which he is on trial and made in the hostile atmosphere of police custody, could be used to impeach him should he choose to testify, he may very likely be deterred from taking the stand. While even the *Walder* decision, which limits the impeachment use of unlawfully obtained evidence to collateral matters, might make the decision to testify difficult, allowing impeachment evidence bearing directly on the crime charged seems to negate the element of choice. Further, it was held in *Miranda* that the Constitution requires that prior to any questioning, "the person must be warned that he has a right to remain silent, [and] that any statement he does make may be used as evidence against him. . . ."[115] If these warnings are not given to a defendant prior to questioning, and should he make potentially damaging statements bearing directly on the crime with which he is charged, the defendant would suddenly realize at the time of trial that he ought not to exercise his constitutional right to testify since his in-custody statements could then be used against him.

112. McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEXAS L. REV. 239, 273 (1946); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 666 (1970); 28 MINN. L. REV. 73, 76 (1943).

113. Rather, the reasons given for the Fourth Amendment rule are (1) the deterrent value on illegal police conduct (Elkins v. United States, 364 U.S. 206, 217 (1960); Wolf v. Colorado, 338 U.S. 25, 42-44 (1949) (Murphy, J., dissenting); Weeks v. United States, 232 U.S. 383, 392 (1914)), and (2) the necessity for maintaining the integrity of the judicial system. Mapp v. Ohio, 367 U.S. 643, 659 (1961); Elkins v. United States, *supra* at 222-23 (1960). Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence From a Suspect*, 43 S. CAL. L. REV. 597, 602-03 (1970).

114. 401 U.S. at 230, *quoting* Malloy v. Hogan, 378 U.S. 1, 8 (1964) (Brennan, J., dissenting).

115. 384 U.S. at 444.

The effect on the jury of admitting illegally obtained statements bearing directly on the crime charged could be disastrous for the defendant, even with the most careful admonition to the jury that such statements are not offered to prove the truth of the matter stated but only for the purpose of impeaching the witness. For example, in *Harris,* the illegally obtained statement amounted almost to a full confession. If the *Harris* jury believed the impeaching statements, despite being carefully instructed, they would have no real alternative but to find the defendant guilty.[116] Contrast this with a jury in a *Walder* situation who might consider the defendant less credible, but, since the impeaching evidence related to an earlier, completely unrelated incident, might very likely acquit. While, as Chief Justice Burger pointed out, "[t]he impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility,"[117] Harris had been compelled, in any meaningful sense of the words, to be a witness against himself in violation of the Fifth Amendment.

An additional objection to extending the *Walder* rationale to embrace *Miranda* violations is the effect such a result would have on unlawful police conduct.

> Since their inception, the exclusionary rules of the fourth and fifth amendments have been recognized as a principal mode of discouraging lawless police conduct. Thus, their major thrust is a deterrent one.[118]

---

116. Appellate courts have often recognized that juries may encounter difficulty in distinguishing various purposes for which evidence is presented to them. *See, e.g.,* Nelson v. O'Neil, 402 U.S. 622, 632 (1971) (Brennan, J., dissenting opinion); Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964); Grunewald v. United States, 353 U.S. 391 (1957); United States v. Sanchez, 349 F.2d 354, 357 (2d Cir. 1965); Lockley v. United States, 270 F.2d 915, 920 (D.C. Cir. 1959) (Burger, J., dissenting opinion). Defendants are not, however, compelled to take the stand, and the reasoning of many courts seems to be that if defendants open the door, the prosecution is invited to walk in. *See* note 94 *supra.* Nevertheless, it appears that the jury faces a nigh impossible task when instructed to close its eyes to the fact that evidence introduced for a limited purpose is highly damaging on the ultimate issue of guilt as well. " 'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction.' " Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring), *quoted in* Riddell v. Rhay, 404 U.S. 974, 977 (1971) (Douglas, J., dissenting) (order denying petition for writ of certiorari).

117. 401 U.S. at 225.

118. Cole, *Impeaching with Unconstitutionally Obtained Evidence: Some Reflections on the Palatable Fruit of the Poisonous Tree,* 18 DEPAUL L. REV. 25, 35 (1968) (footnote omitted).

In *Harris*, Chief Justice Burger views this objection as highly conjectural. In his view the benefits of the impeachment process "should not be lost, . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby."[119] The Chief Justice felt that the unavailability of the illegally obtained evidence for the prosecution's case in chief would be sufficient to deter prohibited police conduct, assuming the existence of *any* deterrent value.[120]

However, in Justice Brennan's view, the constitutional underpinning of the privilege against self-incrimination (the "essential mainstay" of our adversary system) " 'is the respect a government must accord to the dignity and integrity of its citizens.' "[121] To Justice Brennan, "[t]hese values are plainly jeopardized if an exception against admission of tainted statements is made for those used for impeachment purposes,"[122] and the resultant abetting of lawbreaking police officers by the courts would be "monstrous."[123] To the extent that *Miranda* was aimed at deterring unconscionable police conduct, Justice Brennan felt that the *Harris* decision

> will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution.[124]

This deterrent value, at first a reason for the implementation of the Fourth and Fifth Amendment exclusionary rules and now a rationale for their continued existence, has engendered recent and widespread criticism.[125] These criticisms are aimed not at the theory of deterrence via exclusion, but rather at its success. Based upon empirical evidence, the realization that the exclusionary rules are not deterring un-

---

119. 401 U.S. at 225.

120. *Id.*

121. *Id.* at 231-32, *quoting Miranda*, 384 U.S. at 460.

122. *Id.* at 232.

123. *Id. Contra*, Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

124. 401 U.S. at 232.

125. Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80 (1969); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951-53 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

lawful police conduct as once thought, is becoming more and more evident.[126] However, the failure of the Fifth Amendment exclusionary rule to effectively deter unlawful police conduct is not in itself a reason for its abandonment. If the exclusionary rule of the Fifth Amendment is considered to be an integral part of that Amendment, then once violated, the Amendment itself rather than the underlying goals of deterrence and preservation of the integrity of the judicial system commands exclusion.[127] However, if the Fifth Amendment exclusionary rule, like the Fourth, is considered to be a court-made doctrine, fashioned to implement and protect the prohibitions embodied in its terms, then the rule's success in deterring unlawful police conduct would be a major factor relevant to its retention.[128] If this is the nature of the Fifth Amendment exclusionary rule, and assuming the validity of the recent empirical criticisms, then Chief Justice Burger's denegration of the importance of the rule's deterrent value seems well-founded.

Though *Harris* permits the use of prior inconsistent statements secured in violation of *Miranda* for impeachment purposes on matters collateral *or* matters directly relating to the crime charged, the use is not unlimited. Chief Justice Burger injected the limitation that such use be confined to statements otherwise shown to be "trustworthy."[129] While a blind extension of *Walder* might allow the impeachment use of statements considered to be coerced even before *Miranda*,[130] any such

126. For instance, many situations in which the police intervene, such as quieting noisy parties, helping drunks, returning runaways and settling family squabbles, are not likely to give rise to an application of the exclusionary rule. Oaks, *supra* note 125, at 720. In addition, the lawless activities of a corrupt police department are unlikely to be affected by the exclusionary rule. Although an exclusionary rule had long been enforced in a most rigorous fashion in Illinois, the Chicago police department was, in the Fifties, felt to be the most demoralized, graft-ridden and inefficient among larger cities, and many forms of grave police misconduct were attributed to the Chicago policemen. Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L. REV. 565, 585-86 (1955). And, of course, the exclusionary rule only benefits those incriminated by evidence which has been illegally obtained. No recompense is provided for the injury suffered by one who has been the subject of an illegal search which revealed no incriminating items. Oaks, *supra* note 125, at 736.

127. See note 68 *supra*.

128. *See* note 118 *supra* and accompanying text. *Cf.* McNabb v. United States, 318 U.S. 332 (1942) (the Court, relying upon its supervisory power over the federal courts, excluded a confession obtained in violation of federal statutes on the grounds, *inter alia*, that it would demean the integrity of the court to admit such confessions); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 988, 995, 1030 (1966).

129. 401 U.S. at 224.

130. That such use was possible is indicated by implication in United States v. Curry, 358 F.2d 904, 912 (2d Cir. 1966):

> It is true that, if a prior admission were found to be unconstitutionally coerced,

application of *Walder* would be qualified by the pre-*Miranda* requirement of voluntariness. Chief Justice Burger did not, however, define exactly what he had in mind when he said, "provided of course . . . the trustworthiness of the evidence satisfies legal standards."[131]

The *Miranda* warnings were designed to obviate a case-by-case determination of the voluntariness of a confession elicited during custodial interrogation.[132] Since *Harris* involved a *Miranda* violation, and the statements were nevertheless allowed before the jury for impeachment, the Chief Justice appears to have intended a return to pre-*Miranda* standards of admissibility. This would require the court to determine, prior to the introduction of the statements, whether the statements were voluntarily made. A pre-*Miranda* voluntariness inquiry would not be resolved by a mere finding that an accused was unaware of his rights under the Constitution. Rather, the court would again be considering whether the government had engaged in overt compulsion in violation of the Fifth Amendment. Or perhaps the self-incrimination aspect of the Fifth Amendment would no longer be considered and the court would again be determining only whether the reliability of the evidence is sufficient to satisfy the requirements of due process.[133]

After *Miranda* was decided[134] Congress spoke on the subject of the admissibility of confessions and the determination of voluntariness. In 1968, section 3501 was added to Title 18 of the United States

---

the substantial possibility that the admission is no more reliable than the contrary testimony of the accused at trial should lead a court to proceed with caution in permitting its use for impeachment purposes.

131. The full context of this statement by Chief Justice Burger is as follows:

It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards. 401 U.S. at 224.

132. See text accompanying notes 35-44 *supra.*

133. See note 130 *supra.* The following cases illustrate some of the grounds on which statements have been excluded under a due process theory: Lynumn v. Illinois, 372 U.S. 528 (1963) (coercive bargaining); Townsend v. Sain, 372 U.S. 293 (1963) (lack of free and reasoned choice due to use of truth serum); Blackburn v. Alabama, 361 U.S. 199 (1960) (defendant's unique weaknesses); Spano v. New York, 360 U.S. 315 (1959) (official pressure, fatigue and emotional tricks); Brown v. Mississippi, 297 U.S. 278 (1936) (torture).

134. The *Miranda* Court stated:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. . . . However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed. 384 U.S. at 467.

Code in an attempt by Congress to mitigate the judicially-pronounced constitutional requirements of recent cases.[135] The function of determining admissibility of confessions was returned to the trial judge for individual case-by-case consideration, and guidelines were laid down to be used by federal judges in determining the issue of voluntariness.[136]

Subsection (b) of section 3501 delineates some specific circumstances which should be considered by the judge in making his determination. These factors include the time elapsing between arrest and arraignment if the confession occurred during that time, and whether the defendant knew the nature of the offense at the time of making the confession. More importantly, Congress did not omit from its enumeration of items to be considered (1) whether the defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him; (2) whether the defendant had been advised prior to questioning of his right to the assistance of counsel; and (3) whether the defendant had assistance of counsel when questioned and when giving the confession.[137] Section 3501(b) concludes by declaring: "The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."[138]

Federal judges, in their search for a measurement of voluntariness, may find this section controlling.[139] Judges in state courts should find it helpful. And if "trustworthiness" translates to "voluntariness," *Miranda's* teachings may still play a part in the impeachment use of confessions although, as in pre-*Miranda* times, the issue of voluntariness will again be resolved through a case-by-case consideration of *all* the circumstances surrounding the giving of a statement.

An issue to be decided in cases arising after *Harris* is the bearing that drugs or intoxicants will have in determining voluntariness. If ad-

135. *See* 2 U.S. CODE CONG. & AD. NEWS 2112, 2127 (1968).

136. 18 U.S.C. § 3501 (1970). This section was part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title II, § 701(a), 82 Stat. 210.

137. 18 U.S.C. § 3501(b) (1970). These words are strangely reminiscent of *Miranda*. See text accompanying notes 43-44 *supra*.

138. 18 U.S.C. § 3501(b) (1970).

139. Indeed, where Congress and the Court disagree about the interpretation of the Due Process Clause, the Court may well defer to the Congressional version (§ 3501). *See* Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81 (discussing the implications of Katzenbach v. Morgan, 384 U.S. 641 (1966), upon *Miranda* and Title II of the Omnibus Crime Control and Safe Streets Act of 1968). However, in light of *Miranda's* strong Fifth Amendment foundation, the constitutionality of section 3501 is questionable.

missibility rests, even partially, on an element of knowingness (intelligence) any impairment of a defendant's faculties should weigh in the balance. It is well established that the presence of these items removes some of the element of free choice,[140] and evidence obtained from a person addicted to hard drugs while in the throes of withdrawal may be similarly tainted. Though Harris did not claim to have spoken other than voluntarily, inquiry at trial about his bad memory elicited a curious response: "[M]y joints was down and I needed drugs."[141] Had Harris' objections not been confined to alleged violations of New York procedural rules and the tenets of *Miranda*,[142] a judicial journey into areas of voluntariness might well have resulted in exclusion of the statements.

An additional issue yet to be resolved is whether the *Harris* rule encompasses a defendant who takes the stand and merely denies the charges against him without elaboration. The *Harris* Court's failure to adhere to the requirement in *Walder* that the defendant must be able to deny all of the elements of the crime might indicate that a mere denial would allow the admission of earlier "trustworthy" statements.[143] However, any such impeachment would seem to be expressly prohibited by *Walder*,[144] and would thus require a severe limitation of the principles underlying that decision. If a mere denial does not allow a "*Harris*" impeachment, the moment when a contradiction becomes of such consequence as to allow impeachment under the *Harris* standard is a further issue left unresolved by the instant decision.

One member of the *Harris* majority, Justice Harlan, had voiced his "hope that the Court will eventually return to constitutional paths which, until recently, it has followed throughout its history."[145] The Court seems to have embarked on this journey. *Harris* presages a whittling

---

140. Townsend v. Sain, 372 U.S. 293 (1963). *See also* People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966) (intoxication as negating specific intent to commit a crime).

141. 401 U.S. at 227 n.1 (dissenting opinion).

142. See note 18 *supra*.

143. *But see* Lockley v. United States, 270 F.2d 915, 921 (D.C. Cir. 1959) (Burger, J., dissenting):

> The defendant should not be permitted to commit profitable perjury with impunity, but he must be permitted to deny the criminal act charged without thereby giving leave to the government to introduce by way of rebuttal evidence otherwise inadmissible.

144. 347 U.S. at 65.

145. Griffin v. California, 380 U.S. 609, 617 (1965) (concurring opinion) (prosecutor's comment to jury with respect to defendant's failure to testify held violative of the Fifth Amendment).

away of the doctrines growing out of *Weeks*[146] and engenders a feeling that one more battle in the war against crime has been won. But what is the cost? In the words of Justice Douglas:

> The exclusionary rule [of the Fifth Amendment] is a recognition that the vision of law enforcement authorities is often narrowed by their total immersion in the never-ending war against crime. If we permit the legitimate desire to win that war to undermine constitutional guarantees of liberty, our victory will indeed be fleeting.[147]

Martha A. Roof

146. 232 U.S. 383 (1914).

147. Riddell v. Rhay, 404 U.S. 974, 977-78 (1971) (Douglas, J., *dissenting*) (order denying petition for writ of certiorari).